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7 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
8 **OF THE STATE OF CALIFORNIA**
9

10 In the Matter of the Application of:

11 **M.H.**

Precedent Decision No. 03-01

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14 A hearing on this application was held on November 21, 2002, in San Jose, California by
15 Richard P. Fisher, Hearing Officer, California Victim Compensation and Government Claims Board
16 (Board).

17 M.H.'s representative, Martha Vickers of the Santa Clara County Victim Witness Assistance
18 Center, and Daniel Tobey of the Santa Clara County Department of Family and Children's Services,
19 attended the hearing. The victim identified in the application is M.H.¹ She was born on January 30,
20 2002. The hearing was closed to the public pursuant to Government Code section 13963.1.

21 **Claim History**

22 The application is based on the view, previously rejected by the Board, that a person who is
23 exposed to illicit drugs in utero because of their mother's drug use necessarily qualifies at birth as a
24 victim of crime irrespective of evidence of physical injury. The application was filed on behalf of
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29 ¹ Because the application was filed before the effective date of the current statute, Chapter 1141, Statutes 2002 (Senate Bill 1423, Chesbro) all references are to the Government Code sections in effect on or before December 31, 2002.

1 M.H. on March 5, 2002, and requests reimbursement for M.H.'s mental health counseling expenses
2 not yet incurred, but expected to arise in the future.² The application was recommended for denial on
3 the consent agenda for July 9, 2002, and was appealed.

4 **Summary of Issues**

5 Staff recommended that the application be denied because of insufficient evidence that M.H.
6 was the victim of a qualifying crime.

7 **Findings of Fact**

8 According to documentary evidence in the Board's file, M.H. was prematurely born on January
9 30, 2002. At birth, M.H. was underweight, had difficulty breathing, and could not maintain an
10 appropriate body temperature. She was transferred to a neonatal intensive care unit and tested for the
11 presence of drugs because her mother admitted that she had used methamphetamines throughout her
12 pregnancy with M.H. Her mother had also been arrested two weeks prior to M.H.'s birth for
13 possession of, and being under the influence of, methamphetamines. The urinalysis test results were
14 negative; M.H. had no detectable presence of illicit drugs in her system at birth. However, M.H.'s
15 pediatrician, Dr. Patrick Clyne, wrote a letter dated October 28, 2002, in which he states that M.H.
16 "has been demonstrating clinical features typical of infants with *in utero* drug exposure to
17 methamphetamine." Dr. Clyne's letter confirms that M.H.'s urine test was negative for drugs but
18 notes that it is not unusual to have a "false negative" test result for newborns.

19 Neither Ms. Vickers nor Mr. Tobey argued during the hearing that the result of the urinalysis
20 was inaccurate. But Ms. Vickers renewed her argument, made in previous cases, that the urinalysis
21 test is crude and that other more sophisticated testing may have revealed the presence of drugs in
22 M.H.'s system at birth. However, no other evidence was presented prior to or during the hearing that
23 would establish that M.H. had drugs in her system at birth or at any later time.

24 Ms. Vickers argued that the consideration of M.H.'s application should be controlled by *In*
25 *re A.A.*, Precedent Decision 01-10. In that precedent decision, the Board approved a zero award for an
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27 ² As such, the Board is being asked to process the application as a "zero award" whereby a determination of eligibility is
28 made without reference to specific pecuniary loss. (Cal. Code Regs., tit. 2, § 649.22.) All further regulation citations are to
29 the California Code of Regulations, Title 2.

1 infant who, at birth, presented with severe physical injuries that were attributed to her mother's drug
2 use during pregnancy. Ms. Vickers also argued that hair sample testing for M.H.—and all babies
3 similarly situated—should be used for drug testing because medical research clearly reveals that hair
4 analysis is much more accurate than urine analysis in detecting the presence of drugs in a person's
5 system. Finally, Ms. Vickers and Mr. Tobey argued that as a matter of public policy, a zero award for
6 M.H. is appropriate despite the absence of physical injury because the future manifestation of M.H.'s
7 mental injuries is virtually certain.

8 Ms. Vickers also presented articles from government-sponsored studies discussing fetal-
9 child endangerment, especially as regards the placental barrier and the chemistry and cellular
10 structures involved in cases of drug use by pregnant women. All of the materials presented by
11 Ms. Vickers were admitted into the record and considered during the preparation of the Proposed
12 Decision.

13 Based on the testimony of and documentary evidence submitted by Ms. Vickers and Mr. Tobey
14 during the hearing, and on the documentary evidence contained in the Board's file, substantial evidence
15 supports each of the following findings of fact:

- 16 1. M.H.'s mother used methamphetamines during her pregnancy with M.H.
- 17 2. M.H. had no detectable presence of illicit drugs in her system either at birth or at
18 anytime prior to the closing of the record in this matter.

19 **Determination of Issues**

20 The Board shall approve an application for assistance if a preponderance of the evidence shows
21 that as a direct result of a crime the victim incurred an injury that resulted in a pecuniary loss. (Gov.
22 Code, § 13964(a).) Applicants have the burden of proof on all issues necessary to establish their
23 eligibility as a victim of a qualifying crime. (Gov. Code, § 13964(a); Cal. Code Regs., tit. 2, § 647.32.)
24 A "qualifying crime" is defined as a crime that results in injury to the victim, threat of injury to the
25 victim, or death to the victim. (Reg., § 649(a)(18).)

26 First, the Board's decision *In re A.A.* is factually distinguishable from M.H.'s case. The *In re*
27 *A.A.* decision involved a baby who tested positive at her premature birth for amphetamine and
28 methamphetamine and had significant physical injuries. Her injuries included respiratory distress,
29 pervasive infection, a small hole in her heart, retinal blood vessels that were not sufficiently mature,

1 and jaundice. *In re A.A.* therefore stands for the proposition that a child may be eligible for a zero
2 award when such child is born with significant, identifiable physical injuries that are directly
3 attributable to the mother's criminal use of controlled substances. Here, M.H. presented at birth
4 without the presence of drugs in her system and with no reported physical injuries. Therefore, *In re*
5 *A.A.* is not factually on point and cannot be used as a basis for sanctioning a zero award for M.H.

6 Secondly, the argument that a hair sample should have been used for drug testing on M.H.
7 instead of the urinalysis may be valid but the argument does not affect the status of the evidence. The
8 Board may appropriately defer to the sound judgment of health care professionals regarding the types
9 of medical tests that should be administered to patients in substance abuse cases. It may be true that
10 some drug tests are superior to others, but eligibility decisions must be based on the evidence in the
11 record. Here, it is not disputed that the urinalysis performed on M.H. at the time of her birth was
12 negative. Moreover, no other evidence has been produced that would suggest that M.H. has ever had
13 illicit drugs in her system or that she has experienced any drug-related physical injuries to date.

14 M.H. has therefore failed to demonstrate by a preponderance of the evidence that she has
15 suffered physical injury or threat of physical injury as those terms are contemplated in Government
16 Code section 13960. Consequently, it is determined that M.H. is not the victim of a qualifying crime
17 and therefore does not qualify for a zero award. (Gov. Code, § 13964(a); Reg., § 647.32.)

18 **Order**

19 The application for M.H. is denied. She is ineligible for program assistance.
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23 Date: January 20, 2003

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RICHARD P. FISHER
25 Hearing Officer
26 California Victim Compensation and
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